MOTION FILED
OCT 7 2002

No. 02-362

IN THE

Supreme Court of the United States

WHEELING & LAKE ERIE RAILWAY COMPANY,
Petitioner,

v.

CRIS A. BONACORSI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

LOUIS P. WARCHOT
DANIEL SAPHIRE *
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505

Counsel for Amicus Curiae

October 7, 2002

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

31 pp

IN THE

Supreme Court of the United States

No. 02-362

WHEELING & LAKE ERIE RAILWAY COMPANY,
Petitioner,

v.

CRIS A. BONACORSI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae.* This motion is filed pursuant to Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.* Respondent has refused consent.

Amicus curiae AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak, the national intercity passenger railroad company. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest. AAR seeks leave to file a brief

* The letter expressing consent has been filed with the Clerk of the Court.

amicus curiae only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.**

AAR often participates as *amicus curiae* in cases which raise issues related to implementation of the Federal Grade Crossing Safety Program, 23 U.S.C. § 130–typically suits brought under state law alleging negligent failure to install adequate crossing warning devices. Pursuant to the statute and regulations which implement the Federal Program, Congress and the Secretary of Transportation established a uniform, nationwide, data-driven process for addressing hazards at rail-highway grade crossings, which requires states to identify crossings in need of safety improvements and, with the assistance of federal money, to implement crossing improvement projects on a priority basis. AAR has had a long-standing involvement with the Federal Program, including its work with the U.S. Department of Transportation (initiated prior to the Program's inception) to compile a grade crossing inventory. The inventory serves as an important source of information for use in implementation of the Federal Program by federal and state authorities. Thus, AAR is thoroughly familiar with the operation of the Federal Program, as well as with the issues that arise with regularity in crossing cases and their impact on the railroad industry.

AAR filed *amicus* briefs in two cases before this Court which addressed the role of railroads in the Federal Program, and the interplay between the Federal Program and state tort law which purports to regulate grade crossing safety. *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000); *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658 (1993). In those cases, this Court established that whenever federal

---

** *E.g., National Railroad Passenger Corp. v. Griesser*, 122 S.Ct. 386 (2001); *Kansas City Southern Railway Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 S.Ct. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

funds participate in the installation of crossing warning devices, federal law displaces state law duties to select and install adequate devices. Under those circumstances, lawsuits seeking to enforce such state law duties are preempted. This case involves such a lawsuit and, though petitioner submitted an uncontroverted affidavit establishing the participation of federal funds in the installation of the warning device, the Ohio Supreme Court refused to recognize the preemption defense. This decision, which ignored both state precedents on the law of evidence and this Court's prior decisions, erected an evidentiary barrier that will all but eliminate the preemption defense in lawsuits brought in state court.

This result is of concern to AAR's member railroads, not only because it denied petitioner the ability to assert a legitimate defense to a lawsuit (and as a result left it liable for a large jury verdict), but also because it appears to be part of an emerging pattern of state courts imposing heightened evidentiary requirements on litigants seeking to establish federal preemption. *See e.g., Kansas City Southern Ry. v. Johnson,* 798 So.2d 374 (Miss.), *cert denied,* 122 S.Ct. 43 (2001). Contrary to the intent of Congress and the Secretary of Transportation, these decisions apply state law in situations where federal law must prevail. With this development in Ohio, a state in which a large number of railroads, including two of AAR's largest members, operate, AAR's members' concerns have been heightened. Unless the decision below is overturned, railroads will lose their ability to rely on this Court's precedents to determine whether state law duties, as opposed to the regulatory requirements of the Federal Program, are applicable.

When AAR participates in a case as *amicus curiae*, it brings a broad, industry-wide perspective to the issues before the court. This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this

case, AAR has already filed *amicus* briefs in the Ohio Court of Appeals and Supreme Court. AAR's long standing involvement in this case, and resultant familiarity with the course of the litigation, will enhance its ability to present to this Court the railroad industry's perpective on the impact of the decision below.

For these reasons, AAR respectfully requests that leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

LOUIS P. WARCHOT
DANIEL SAPHIRE *
ASSOCIATION OF AMERICAN
RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505

Counsel for Amicus Curiae

October 7, 2002

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
I. THE COURT BELOW IMPOSED A HEIGHTENED EVIDENTIARY REQUIREMENT ON A FEDERAL PREEMPTION DEFENSE IN ORDER IMPERMISSIBLY TO APPLY STATE LAW IN AN AREA OF GRADE CROSSING SAFETY TO WHICH THIS COURT HAS HELD THAT FEDERAL LAW PREVAILS	5
A. The Ohio Supreme Court Improperly Reversed Summary Judgment For Petitioner In Disregard of Established Federal Law	7
B. The Ohio Supreme Court's Ruling Puts A Near Impossible Burden on Railroads to Assert a Defense Based on Federal Law and the Constitution and Thereby Frustrates Federal Policy	11
C. The Decision Below Renders A Railroad's Obligations at Crossings Dependent Not On Federal Regulations But On The Venue Choices Made By Plaintiffs	15

TABLE OF CONTENTS—Continued

Page

II. THE DECISION BELOW IS PREMISED ON A MISREADING OF *SHANKLIN* AND THE FEDERAL REGULATORY PROCESS FOR UPGRADING CROSSINGS 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES — Page

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 14
Armijo v. Atchison, Topeka & Santa Fe Ry., 87 F.3d 1188 (10th Cir. 1996) 6, 19
Bock v. St. Louis Southwestern Ry. Co., 181 F.3d 920 (8th Cir. 1999), *cert. denied,* 529 U.S. 1086 (2000) 4
Bonacorsi v. Wheeling & Lake Erie Ry., 91 Ohio St.3d 1483, 744 N.E.2d 1196 (2001) 8
Bonacorsi v. Wheeling & Lake Erie Ry., 95 Ohio St.3d 314, 767 N.E.2d 707 (2002) 9, 10, 11, 12, 17
Carpenter v. Consolidated Rail Corp., 69 Ohio St. 3d 259, 631 N.E.2d 607 (1994) 17
CSX Transp., Inc., v. Easterwood, 507 U.S. 658 (1993) ..... *passim*
CSX Transp., Inc. v. Easterwood, 933 F.2d 1548 (11th Cir. 1991) 6
CSX Transp., Inc. v. Powers, 97 F.Supp.2d 1297 (S.D. Ala. 2000) 4
Elrod v. Burlington Northern, R.R, 68 F.3d 241 (8th Cir. 1995) 6
Flood v. CSX Transp., Inc., No. C-2-99-1186 (S.D. Ohio July 12, 2001) 15
Gollihue v. Consolidated Rail Corp., 120 Ohio App.3d 378, 697 N.E. 2d 1109 (1997) 7, 8
Hatfield v. Burlington N. R.R., 958 F.2d 320 (10th Cir. 1992) 6
Hatfield v. Burlington N. R.R., 64 F.3d 559 (10th Cir. 1995) 19
Hester v. CSX Transp., Inc., 61 F.3d 382 (5th Cir. 1995), *cert. denied,* 116 U.S. 815 (1996) ... 6
Howlett ex rel Howlet v. Rose, 496 U.S. 356 (1990) 14, 15

TABLE OF AUTHORITIES—Continued

	Page
Illinois Cent. R.R., Bennett and Wright v. Winters, 815 So.2d 1168 (Miss. 2002)	16
Ingram v. CSX Transp., Inc., 146 F.3d 858 (11th Cir. 1998)	6
Kansas City Southern Ry. v. Johnson, 798 So.2d 374 (Miss.), *cert. denied,* 122 S. Ct. 43 (2001)	3, 15
Karl v. Burlington N. R.R., 880 F.2d 68 (8th Cir.1989)	6
Marshall v. Burlington N., Inc, 720 F.2d 1149 (9th Cir. 1983)	6
Martin v. Illinois Cent. R.R. and Dew, 648 So.2d 1165 (Miss. 1995)	16
McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934)	14
Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916)	15
Norfolk Southern Ry. v. Shanklin, 529 U.S. 344 (2000)	*passim*
Norfolk Southern Ry. v. Shanklin, 173 F.3d 386 (6th Cir.1999)	6
In re Rail Collision Near Chase Maryland, 680 F.Supp. 728 (D.Md. 1987)	16
Shots v. CSX Transp., Inc., 38 F.3d 304 (7th Cir. 1994)	6, 7, 8
Strantz v. Pinion and Illinois Cent. R.R., 652 So.2d 738 (Miss. 1995)	16
Testa v. Katt, 330 U.S. 386 (1947)	14, 15
Union Pac. R.R. v. Sharp, 952 S.W.2d 658 (Ark. 1997)	6

CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const. art. VI, §2	14
23 U.S.C. § 130(d)	12

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 1349	16
45 U.S.C. § 433(a)	12
49 U.S.C. § 20106	3, 13
Federal Railroad Safety Act of 1970, Pub. L. No. 91-548, 84 Stat. 971	2
Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282	1
23 C.F.R. § 140.904(b)	18
§ 646. 214(b)(3)(i)	19
§ 646. 214(b)(3) & (4)	3, 8
§ 646. 216(b)(1)	18
§ 646. 216(d)	18
§ 646. 216(e)	18
§ 646. 216(e)(1)	18
Part 646	13
Part 924	13
§ 924.9	13
§ 924.11(a)	13
OTHER AUTHORITIES	
Brief for Respondent, *Norfolk Southern Ry. v. Shanklin*, 529 U.S. 344 (2000)	8
Federal Highway Administration, National Standards for Traffic Control Devices; Manual on Uniform Traffic Control Devices for Streets and Highways *(MUTCD)*, 65 Fed. Reg. 78923 (2000)	14
Federal Railroad Administration, *Railroad Safety Statistics, Interim Report 2001* <http://safetydata.fra.dot.gov/officeofsafety/Forms/Default.asp>	2

TABLE OF AUTHORITIES—Continued

Page

Federal Railroad Administration, Selection and Installation of Grade Crossing Warning Systems: Notice of Proposed Rulemaking, 60 Fed. Reg. 11649 (1995) 2

Federal Railroad Administration, Selection and Installation of Grade Crossing Warning Systems: Termination of Rulemaking, 62 Fed. Reg. 42733 (1997) 2

Plaintiff-Appellant's Merits Brief, *Bonacorsi v. Wheeling & Lake Erie Ry.*, 95 Ohio St.3d 314, 767 N.E.2d 707 (2002).....8, 10, 11

U.S. Dept. Of Transp. Report to Congress: *Railroad Highway Safety Part II: Recommendations for Resolving the Problem* (1972)..... 12

U.S. Dept. Of Transp., *National Railroad-Highway Crossing Inventory Update Manual* (1976)..... 13

STATEMENT OF INTEREST OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 90 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry. One matter of great importance to AAR members is grade crossing safety, an area impacted by actions of all three branches of government.

Crossing safety has long been a focus of public policy. The federal government has taken an active role in funding crossing improvements and regulating grade crossings, culminating with Congress establishing the Federal Grade Crossing Safety Program (section 203 of the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, 283), and assigning responsibility for its implementation to the Secretary of Transportation. [Petition at. 4-7] State law also plays a role in the regulation of crossings, frequently in the form of litigation arising out of accidents between trains and motor vehicles at grade crossings.[2] The impact of this

---

[1] No person or entity other than AAR has made monetary contributions toward this brief and no counsel for any party has authored this brief in whole or in part.

[2] In a rulemaking intended to adopt nationwide standards clarifying the allocation of responsibility for selection of crossing warning devices, the effectiveness of state tort law in promoting crossing safety was called into question by the federal government, which opined that the "ad hoc system of grade crossing improvements, driven by tort law and individual jury awards, runs counter to the goal of a uniform national program based

litigation often goes beyond the individual litigants, as opinions handed down by courts can have industry-wide ramifications, affecting the rights and responsibilities of all parties with a stake in crossing safety. As a result, and because grade crossings have such a pervasive presence on the rail network,[3] AAR frequently seeks to participate as *amicus curiae* in crossing cases.

Typically, suits arising from grade crossing accidents include claims that the railroad negligently failed to provide adequate warning devices at the crossing. These claims bring into focus the interplay between state common law rules related to crossings and the role of the federal government in grade crossing safety. Twice during the past decade, this Court has addressed that relationship and its impact on state tort law. *Norfolk Southern Ry. v. Shanklin,* 529 U.S. 344 (2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993). In *Easterwood*, this Court held that at crossings at which federal funds have participated in the installation of warning devices, state law duties to select and install adequate warning devices are preempted by the express preemption provision set forth in the Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-548, 84 Stat. 971 (49

---

on planning and prioritization." Federal Railroad Administration, Selection and Installation of Grade Crossing Warning Systems: Notice of Proposed Rulemaking, 60 Fed. Reg. 11649, 11651 (1995). Although it ultimately was withdrawn, the government reaffirmed its adherence to the premises that underlay the proposed rule: "FRA continues to believe that the proper relationship between railroads and state and local governments in terms of selection and installation of warning devices is as proposed in the NPRM." Federal Railroad Administration, Selection and Installation of Grade Crossing Warning Systems; Termination of Rulemaking, 62 Fed. Reg. 42733, 42734 (1997).

[3] As of 2001, there were 153,848 public grade crossings on the nation's rail system. Federal Railroad Administration, *Railroad Safety Statistics: Interim Report 2001*, Table 9-3, available at http://safetdata.fra.dot.gov/officeofsafety/Forms/Default.asp.

U.S.C. §20106), and regulations issued by the Secretary of Transportation at 23 C.F.R. §646.214(b)(3)&(4), which partially implement the Federal Program. 507 U.S. at 670-71. *Shanklin* reaffirmed the *Easterwood* decision, and clarified that federal funding triggers preemption without regard to whether it can be shown that (1) the Secretary of Transportation approved the warning devices as adequate; (2) a diagnostic team reviewed the crossing; or (3) the crossing characteristics listed in the regulations as warranting active devices are present at the crossing. 529 U.S. at 356-57.

Federal preemption in the context of grade crossing litigation has remained an important and recurring issue facing railroads. Lawsuits continue to be filed against railroads alleging negligent failure to provide adequate warning devices at crossings. Such claims persist even in cases where the warning devices at the crossing have been installed with federal funds, notwithstanding this Court's holding that

> [w]hat States cannot do–once they have installed federally funded devices at a particular crossing–is hold the railroad responsible for the adequacy of those devices.

Shanklin, 529 U.S. at 358.

These suits are characterized by new theories and strategies aimed at evading the *Easterwood/Shanklin* holdings, which sometimes, as in the court below, meet with success.[4] For example, after *Shanklin* was decided, a district court properly held that the installation of passive warning devices with federal funds preempted state law claims that the railroad failed to install adequate devices, notwithstanding a subse-

---

[4] The decison below follows on a similar ruling by another state court which, in disregard of its long-settled law recognizing the *prima facie* weight accorded to affidavits and trial testimony, also ruled the railroad failed to prove federal funding of a crossing upgrade. *See Kansas City Southern Ry. v. Johnson,* 798 So.2d 374 (Miss.), *cert. denied,* 122 S.Ct. 43 (2001).

quent decision to upgrade the crossing with active devices. *CSX Transp., Inc. v. Powers*, 97 F. Supp.2d 1297, 1304 (S.D. Ala. 2000), *appeal pending*, No. 02-10999-EE (11th Cir.). Nonetheless, despite holding that the railroad could not be legally liable for the adequacy of the warning devices that were at the crossing at the time of the accident, the court went on to hold that the plaintiff's suit could go forward on the theory that the railroad negligently delayed the installation of the active devices. *Id.* at 1308.[5]

Through the Federal Grade Crossing Program, the state and federal governments work together to improve crossing safety, with the railroads having a well defined role in that process. In essence, suits that press warning device adequacy claims at crossings where federally funded devices have been installed demand that railroads institute private, independent programs to evaluate grade crossings, notwithstanding that such efforts would be duplicative of the Federal Program. To the extent courts continue to permit these suits, it undermines the uniformity Congress demanded when it enacted the Federal Program, and hinders the railroads' ability to rely on federal law in determining their responsibilities under the Program. Therefore, this case is of great concern and interest to AAR's member railroads.

STATEMENT OF THE CASE

AAR adopts the Statement of the Case of Petitioner

SUMMARY OF THE ARGUMENT

The decision below should be reviewed because it improperly imposed on petitioner an unwarranted, heightened evidentiary requirement that served as a means for the court to ignore its obligation to enforce federal law. In

---

[5] *But see Bock v. St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 923 (8th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000)(rejecting negligent delay claim).

disregarding petitioner's uncontroverted evidence that federal funds had participated in the installation of the warning device, the court below set aside a legitimate preemption defense to a state law claim alleging negligent failure to install adequate crossing warning devices. This case is part of an emerging pattern of state court decisions that, by imposing special evidentiary requirements on the federal preemption defense, undermine the uniformity in rail safety laws mandated by Congress and put railroads in an untenable position with regard to their obligations at crossings.

In reaching this erroneous decision, the court below relied on the standard for preemption set forth in a prior state decision which has been discredited by a subsequent decision of this Court. The erroneous standard followed by the court below led it to focus on irrelevant facts in determining whether petitioner had met its burden of showing that the crossing at which the accident occurred had been installed with federal funds. This Court should review this case and correct the erroneous preemption standard applied by the court below so that legitimate preemption defenses, which serve to effectuate Congress' policy choices, may be pursued in state court in Ohio and other states

ARGUMENT

I. THE COURT BELOW IMPOSED A HEIGHTENED EVIDENTIARY REQUIREMENT ON A FEDERAL PREEMPTION DEFENSE IN ORDER IMPERMISSIBLY TO APPLY STATE LAW IN AN AREA OF GRADE CROSSING SAFETY TO WHICH THIS COURT HAS HELD THAT FEDERAL LAW PREVAILS

Disregarding its own state precedents, the court below erected an evidentiary obstacle in order to thwart the assertion of a legal defense which derives from the U.S. Constitution and a federal statute. This decision of a state's highest court has the effect of elevating state policy over federal policy in

the important area of railroad safety. Thus, it is at odds with *Easterwood*, in which this Court, consistent with Congress' intent, established the primacy of federal policy, setting forth a straightforward test to determine when federal law preempts duties arising under state law to select and install adequate warning devices. 507 U.S. at 671. In *Shanklin,* this Court resolved a conflict that developed among state and federal courts subsequent to the *Easterwood* decision,[6] holding that the participation of federal funds in the installation of warning devices triggers preemption, and rejecting the ruling of some lower courts that additional facts must be shown.

This conflict is now being resurrected, as some state courts look for new ways to circumvent a federal policy with which they disagree. Such a practice has repeatedly been held by this Court to be impermissible [Petition at 18-19]. As it has in the past, this Court should review a decision of a state court that has disregarded the mandates of federal law. Failure to do so will have serious implications not just for petitioner, but for all railroads, as well as other defendants, seeking to assert, in state courts, federal rights or defenses in reliance on policies established by Congress and the federal agencies.

---

[6] Compare *Ingram v. CSX Transp., Inc.*, 146 F.3d 858 (11th Cir. 1998); *Armijo v. Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996); *Elrod v. Burlington Northern, R.R.*, 68 F.3d 241 (8th Cir. 1995); *Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 U.S. 815 (1996); *Union Pac. R.R. v. Sharp*, 952 S.W.2d 658 (Ark. 1997), all holding that under *Easterwood*, proof of federal funding of crossing warning devices triggers preemption, with *Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994); *Norfolk Southern Ry. v. Shanklin*, 173 F.3d 386 (6th Cir. 1999), holding that proof of federal funding is not in itself sufficient to trigger preemption. Prior to *Easterwood*, four federal courts of appeals had established four different rules regarding preemption: *Hatfield v. Burlington N. R.R.*, 958 F.2d 320 (10th Cir. 1992); *CSX Transp., Inc. v. Easterwood*, 933 F.2d 1548 (11th Cir. 1991); *Karl v. Burlington N. R.R.*, 880 F.2d 68 (8th Cir.1989); *Marshall v. Burlington N., Inc.*, 720 F.2d 1149 (9th Cir. 1983).

A. The Ohio Supreme Court Improperly Reversed Summary Judgment For Petitioner In Disregard of Established Federal Law

The history of this case confirms that the decision below is not simply an instance of a state's highest court correcting an erroneous evidentiary ruling by a lower state court: instead, it is a glaring example of the misuse of state rules to defeat a federal policy which the state finds wanting. This case, which arose from a crossing accident, reached the summary judgment stage after this Court's decision in *Easterwood*, but prior to the *Shanklin* decision. Because the crossing at which the accident occurred was equipped with warning devices installed with federal funds, petitioner sought summary judgment, asserting a federal preemption defense to the claim that it had negligently failed to install adequate warning devices. Petitioner proffered the affidavit of Susan Kirkland, the manager of the Rail Safety Section of the Ohio Rail Development Commission (an agency within the Ohio Department of Transportation), as evidence of the participation of federal funds in the installation of the warning device at the crossing.

The trial court ultimately denied summary judgment on the authority of the decision of the Ohio Court of Appeals in *Gollihue v. Consolidated Rail Corp.*, 120 Ohio App. 3d 378, 697 N.E.2d 1109 (1997) [Petition at 30a]. Determining that *Easterwood* should be interpreted narrowly in order to preserve and maximize the role for state tort law, *Gollihue* had followed the Seventh Circuit's decision in *Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994),[7] in holding that federal funding did not trigger federal preemption of state law warning device adequacy claims in the absence of a showing that the Federal Highway Administration (FHWA) had

---

[7] *Shots* had opined that the *Easterwood* decision need not be read "literally." 38 F.3d at 307.

approved, as adequate, the warning devices at the crossing. 120 Ohio App.3d at 396-97, 697 N.E.2d at 1120-21.

During the pendency of petitioner's appeal,[8] this Court decided *Shanklin*, rendering *Shots*, and any precedent that followed *Shots*, no longer good law. Recognizing that *Shanklin* was dispositive, the Ohio Court of Appeals properly held that petitioner was entitled to summary judgment on the warning device claim.[9] Although the Court of Appeals' decision was predictable and entirely unremarkable in light of *Shanklin*, the Ohio Supreme Court granted discretionary review. *Bonacorsi v. Wheeling & Lake Erie Ry.*, 91 Ohio St.3d 1483, 744 N.E.2d 1196 (2001).

Before the Ohio Supreme Court, respondent argued that *Shanklin* was distinguishable from this case. Respondent raised several non-existent or irrelevant distinctions, essentially making the very same arguments that were considered and rejected by this Court in *Shanklin*. For example, respondent insisted that this Court applied preemption in *Shanklin* because there had been a determination by a "diagnostic team that lights and gates were unnecessary at the crossing in issue," a fact not present in this case. Plaintiff-Appellant's Merits Brief at 20. This argument simply could not be squared with this Court's ruling in *Shanklin,* wherein, in response to plaintiff's assertion that no diagnostic team had analyzed the crossing,[10] it explained that: "[n]or does the[] applicability [of §646.214(b)(3)&(4)] depend on any individualized determination of adequacy by a diagnostic team or FHWA official." 529 U.S. at 356. Respondent made several

---

[8] Respondent also had appealed, arguing that the trial court erred in refusing to allow the jury to consider punitive damages.

[9] The court further ruled that since it was evident the jury award had been based solely on the finding of inadequate warning devices, the court reversed the verdict and entered judgment for petitioner. Petition at 26a.

[10] Brief for Respondent at 16, 33, 36, *Norfolk Southern Ry. v. Shanklin*, 529 U.S. 344 (2000).

other arguments in urging reversal of the Court of Appeals' decision, including that petitioner had not shown that federal funds had been used to install the warning devices.

Faced with clear and controlling legal precedent supporting the Court of Appeals' decision, the Ohio Supreme Court announced a unique reading of Ohio evidence law, in disregard of its own precedents, to defeat petitioner's preemption defense. Without a single specific citation to the affidavit or deposition of Susan Kirkland, the Ohio Supreme Court found that she "clearly lacked the personal knowledge required [ ] to support the statements in her affidavit regarding federal funding." 95 Ohio St.3d at 320, 767 N.E.2d at 713-14. As a consequence of its decision to disregard the crucial evidence provided by Ms. Kirkland, the Ohio Supreme Court reversed the Court of Appeals' decision and reinstated the verdict for respondent. *Id.* at 321, 767 N.E.2d at 714.

The ruling below clearly was crafted to avoid the outcome mandated by *Shanklin*, as there could have been no witness more qualified or with greater knowledge on the issue of federal funding than Ms. Kirkland, who managed the Ohio Buckeye Crossing Program under which the warning devices had been installed. The dissent, which recounted in detail the contents of the Kirkland deposition, concluded that, with respect to the crossing program in question, Ms. Kirkland:

> was responsble for setting up the funds, reviewing the plans, and processing the bills for the crossbuck program. She attended meetings and helped set up the parameters and the procedures of the program. She helped draft an agreement between ODOT and [respondent] in which ODOT agreed to supply all new crossbuck signs at passive crossings and to reimburse [respondent] with federal funds for its installation costs.

95 Ohio St.3d at 323, 767 N.E.2d at 715-16 (Kline, J., dissenting). Citing to analogous Ohio cases (a component missing from the majority opinion), the dissent concluded that the witness "had personal knowledge to state in her

affidavit that federal funds were used to install crossbuck signs" at the crossing in question, and, consequently, that the Court of Appeals' determination on personal knowledge should have been upheld. *Id.*, 767 N.E.2d at 716.

Since the court below was without authority to alter the legal requirements for establishing a preemption defense set forth in *Easterwood* and *Shanklin*, at respondent's urging the court instead engaged in a fact-based inquiry, focusing on whether petitioner had established the relevant fact to support its preemption defense: the participation of federal funds in the installation of the warning device at the crossing where the accident occurred. The fact of participation of federal funds was demonstrated by the affidavit submitted by petitioner and Ms. Kirkland's deposition, and that fact was neither challenged nor controverted by any evidence submitted by respondent.

Instead of submitting evidence to the contrary, respondent argued that a heightened burden of proof be imposed on petitioner on the grounds that the preemption defense was inimical to the State's public policy because it would have the effect of depriving an injured motorist of the right to seek monetary damages under state law.[11] Respondent insisted that the court should demand proof beyond what is required by federal law, asserting that "it is not unreasonable to require that preemption be invoked only based on documentary proof

---

[11] Plaintiff-Appellant's Merits Br. at 21. Respondent argued that this Court's precedents impose a heavy burden on a party seeking to establish preemption. It is true that the burden of establishing that Congress intended to preempt state law is on the party seeking to rely on preemption. However, with respect to the issue in this case that determination has been unequivocally made by *Easterwood*. And, there is no precedent to support the proposition that once Congress' intent to preempt is established, defendants also are to be held to a heightened evidentiary burden when attempting to prove the facts which are relevant to a preemption defense.

of the factual predicates as outlined in *Shanklin*." Plaintiff-Appellant's Merits Br. at 21.

There is, however, no requirement that the fact of federal funding may be established only by documentation. Thus, respondent invited the court below impermissibly to impose a special, more stringent evidentiary burden in this case in order to avoid the dictates of federal law. Although other courts have routinely acknowledged the fact of federal funding based on affidavits submitted by officials knowledgable about the relevant crossing project [Petition at 15], the court below accommodated respondent's demands.

B. The Ohio Supreme Court's Ruling Puts A Near Impossible Burden on Railroads to Assert a Defense Based on Federal Law and the Constitution and Thereby Frustrates Federal Policy

In essence, the court below has all but foreclosed the ability of railroads to assert a valid preemption defense to negligence claims brought in state court alleging inadequate warning devices. Given the close involvement of petitioner's witness in the implementation of the relevant crossing program, *see* 95 Ohio St.3d at 323, 767 N.E.2d at 715 (Kline, J., dissenting), it is hard to imagine ever proffering a witness with greater personal knowledge as to the source of funding of a grade crossing project. Ms. Kirkland was involved in all the key aspects of the project under which the crossing device was installed, except, as she acknowledged, the actual "handling" of the federal money.[12]

---

[12] Rather than focus on the totality of her testimony, the court below simply noted that "Kirkland testified that ODOT was responsible for handling federal funds' and "that she did not work for ODOT . . ." 95 Ohio App.3d at 320, 767 N.E.2d at 713. Respondent had directed the court's attention to Kirkland's testimony that she did not write checks or make deposits. Plaintiff-Appellant's Merits Br. at 25-26, n.16] . In any event, the majority was mistaken in concluding that Ms. Kirkland was not

The majority's insistence on proof of "handling federal money" was based on a lack of understanding of the procedures involved in federally funded projects. This resulted in a near impossible burden of proof, inasmuch as the state pays the railroad for construction and other services with state funds and is then reimbursed with federal funds remitted by wire transfer directly to the state's account. [Petition at 21-22, n. 13] Thus, it is unlikely that testimony can ever be proffered by a state official who is knowledgeable about the implementation of crossing programs and who also has actually handled the receipt and deposit of federal funds.

If allowed to stand unreviewed, this case will serve as an open invitation to other states similarly to contrive evidentiary standards (or other rules) which not only deny railroads the right to assert a defense based on federal law, but which result in state policy preferences trumping Congress' policy choices for addressing crossing safety embodied in the Federal Grade Crossing Program. Prior to the Federal Program, the effectiveness of public policy in promoting crossing safety was called into question.[13] The Federal Program, which was established to address this problem, calls for a data-driven process for identifying and upgrading crossings, either with active or passive warning devices, on a prioritized basis. The Federal Program requires each state to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. § 130(d).

---

affiliated with ODOT. 95 Ohio St.3d at 323, n. 11, 767 N.E.2d at 716, n. 11 (Kline, J., dissenting)

[13] *See* U.S. Dept. of Transp., Report to Congress: *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* 34 (1972). As part of the FRSA, the Secretary of Transportation was required to study the problem of crossing safety and report back to Congress. 45 U.S.C. § 433(a).

The process by which the states identify crossings which are hazardous, and develop and prioritize safety improvement projects, is subject to regulations issued by the FHWA at 23 C.F.R. Part 924.[14] Other federal regulations (at 23 C.F.R. Part 646) establish standards of adequacy for crossing warning devices when federal funds are used for upgrades. As a result, "state and private decisionmaking authority is displaced," *Easterwood,* 507 U.S. at 670, and state law may not "impose an independent duty on a railroad to identify and/or repair dangerous crossings." *Id.* at 671.

In a civil lawsuit, a preemption defense invokes Congress' decision that on the issue of rail safety federal policy, as embodied in regulations issued by the Secretary of Transportation, prevails over state law. *See* 49 U.S.C. § 20106. Here, the state's policy preference, which would hold railroads legally liable for failing to take certain actions (retrospectively determined by a jury to be reasonable), presumes a different set of roles and obligations for railroads than does federal policy.[15] The court's application of ad hoc

---

[14] These regulations require that implementation of federally-funded crossing projects be undertaken on the basis of relative hazard ranking (to ensure that the potentially more dangerous crossings are upgraded first and that federal money is used in a cost effective manner). 23 C.F.R. §§ 924.9; 924.11(a). As part of that ongoing process, railroads are to provide the state with data related to their train operations. *See* U.S. Dept. of Transp., *National Railroad-Highway Crossing Inventory Update Manual* C-3 (1976). After identifying a crossing as a candidate for possible upgrade, based on its survey, the state typically will convene a diagnostic team, which usually will include a representative of the railroad. As a result of a diagnostic review, a crossing may be placed on a state's schedule for upgrades, which must be submitted to the federal government for approval.

[15] During the process of revising the Manual on Uniform Traffic Control Devices, the Federal Highway Administration explained that "[t]he FHWA and the Federal Railroad Administration have reviewed Federal law, regulations and guidance and found that although they encourage voluntary railroad involvement (as members of diagnostic

requirements to effectuate the state's (presumed) preference for permitting damage suits to go forward is an outcome which this Court has steadfastly refused to permit, as being inconsistent with the Supremacy Clause of the United States Constitution.[16] This Court has consistently made it clear that state courts have an obligation to enforce federal law as if it were its own law, "[f]or the policy of the federal Act is the prevailing policy in every state." *Testa v. Katt*, 330 U.S. 386, 393 (1947); *Howlett ex rel Howlet v. Rose*, 496 U.S. 356, 371 (1990); *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934) ("A state may not discriminate against a right arising under federal law." *Id.* at 234).

This case falls squarely in the category of cases in which state courts have manipulated state rules to evade their obligation to enforce federal law. Under Ohio law, petitioner met its evidentiary burden of demonstrating that federal funds were used to install the warning devices at the Howe Road crossing through submission of the uncontradicted affidavit of a competent witness. After considering and rejecting respondent's objections to the affidavit, the Ohio Court of Appeals recognized that the evidence submitted was sufficient to establish that "federal funds were used to pay for the signs installed at the Howe Road crossing." [Petition at 26a] This proved the fact necessary to establish a preemption defense to respondent's claim. Once the party seeking summary judgment has proved a fact in accordance with the

---

teams where federal funds are involved) in the analysis of need for and type of protection, they do not impose on railroads the responsibility to make, or share in making, determinations of need for or selection of traffic control devices." Federal Highway Administration, National Standards for Traffic Control Devices; Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD), 65 Fed. Reg. 78923, 78947 (2000).

[16] U.S. Const., art VI, § 2. It is axiomatic that courts must enforce the rules established by Congress even if the court believes to do otherwise would better serve public policy. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 629 (1997).

existing rules of evidence applicable to summary judgment motions, that fact must be assumed for the purpose of the motion regardless of its alleged impact on the state's policy. When summary judgment was properly granted by the Court of Appeals, it was impermissible for the state's highest court to "refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers." *Testa*, 330 U.S. at 393; *See also Howlett*, 496 U.S. at 371. ("The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or refusal to recognize the superior authority of its source."); *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211, 222 (1916).

C. The Decision Below Renders A Railroad's Obligations at Crossings Dependent Not On Federal Regulations But On The Venue Choices Made By Plaintiffs

In contrast to the Ohio Supreme Court's decision, a federal court in Ohio accepted an affidavit from the very same witness found by the court below to "lack[ ] . . . personal knowledge" on the issue of federal funding, *see Flood v. CSX Transp., Inc.,* No. C-2-99-1186 (S.D. Ohio, July 12, 2001). These incongruous outcomes underscore why allowing this case to go unreviewed would create an untenable situation. Permitting this case to stand would establish competing sets of railroad obligations with respect to federally funded crossing warning devices within the state of Ohio, depending solely on whether litigation arising from a crossing accident were pursued in state or federal court.[17] Congress' goal of uniformity with respect to rail safety cannot long survive in such an environment.

---

[17] As petitioner points out, as a result of the *Johnson* decision, the same situation also now exists in Mississippi. [Petition at 15]

Moreover, the erosion of the primacy of federal policy choices, which respondent has sought successfully, can be hastened by forum shopping, to which crossing accident cases readily lend themselves. Plaintiff's will have every incentive to funnel crossing cases into state courts in the knowledge that claims which would be barred in federal court will likely be permitted to proceed in state court. Plaintiffs often are able to maintain an action in state court, even if diversity of citizenship exists between the plaintiff and the railroad, by employing the tactic of naming as a defendant a member of the crew who happens to be a citizen of the same state as plaintiff, even though there is no intention of ultimately pursuing damages against the crew member. Typically, the locomotive engineer is named as a defendant, though in some cases a track inspector or supervisor is named in order to avoid federal court. In cases of accidents involving Amtrak, the lawsuit often is brought against the railroad owning the track without naming Amtrak as a defendant, in order to avoid removal based on Amtrak's status.[18] These litigation tactics are utilized today[19] and will only be further encouraged if state courts that are hostile to preemption are given free reign to defeat preemption defenses through manipulation of state evidentiary rules. As a result, notwithstanding this Court's unequivocal holding in *Shanklin,* the goal of uniformity of federal railroad safety law will remain a chimera.

---

[18] Federal jurisdiction exists in cases where Amtrak is a defendant. 28 U.S.C. §1349. *In re Rail Collision Near Chase Maryland,* 680 F.Supp. 728 (D. Md. 1987).

[19] *E.g., Illinois Cent. R.R., Bennett and Wright v. Winters,* 815 So.2d 1168 (Miss. 2002)(crewmembers Bennet and Wright named as defendants); *Strantz v. Pinion and Illinois Cent. R.R.,* 652 So.2d 738 (Miss. 1995) (crew member Pinion named as defendant); *Martin v. Illinois Cent. R.R. and Dew,* 648 So.2d 1165 (Miss. 1995) (crew member Dew named as defendant)

II. THE DECISION BELOW IS PREMISED ON A MISREADING OF *SHANKLIN* AND THE FEDERAL REGULATORY PROCESS FOR UPGRADING CROSSINGS

The error of the court below was compounded by its arbitrary adherence to a pre-*Shanklin* state court decision under which state law duties to select and install adequate warning devices are not preempted until federal funds "actually have been . . . spent." 95 Ohio St.3d at 320, 767 N.E.2d at 713 (citing *Carpenter v. Consolidated Rail Corp.*, 69 Ohio St. 3d 259, 631 N.E.2d 607 (1994)). The focus of the court below on whether Ms. Kirkland actually handled federal money, *id.*, and whether the state actually "received money from the federal government," *id.* at 320, n.10, 767 N.E.2d at 714, n.10, shows that the court's analysis was informed by the erroneous standard set forth in *Carpenter.* Application of this standard—which conditions preemption on whether federal dollars have been disbursed to the state—not only is inconsistent with applicable federal law and this Court's holding in *Shanklin,*[20] it would leave railroads whose crossings are the subject of federally funded projects in an untenable position.

The test for preemption applied by the court below has the effect of continuing in force state law duties to select and install adequate warning devices well beyond a time when the railroad has any discretion whatsoever to act on those putative duties. Crossings that are upgraded pursuant to federally funded projects become subject to a process that must be carried out in accordance with federal regulations, and subject to federal oversight, at the project's outset, well

---

[20] FHWA regulations and the *Easterwood* and *Shanklin* decisions make it clear that it is federal funds "participation"—not disbursement—that triggers preemption. *See* Petition at 20-22. The court below made no attempt to reconcile the *Carpenter* standard with the preemption standard set forth in *Shanklin.*

before the state is likely to have been reimbursed with federal money. When a crossing-improvement project is submitted for federal funding, "[t]he costs of preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA are eligible for Federal-aid participation." 23 C.F.R. § 646.216(e)(1); *id.* 140.904(b). At this point, the role of the railroad is limited under the Federal Program, and any discretion to act independent of the Program vanishes once the process of upgrading a crossing has begun: thus, even if, in the railroad's judgment, different or additional warning devices are called for, it simply has no authority to carry out that judgment.

A series of federal regulations set forth a step by step process for crossing improvement projects, from project initiation to completion. *See e.g.,* 23 C.F.R. § 646.216(b)(1) (authorizing submission of preliminary engineering services and cost estimates by the railroad); *id.* § 646.216(d) and (e) (governing preparation of a contract, which must comply with certain federal requirements and be approved by the federal government, covering the installation of the devices). As the project moves forward, the state must authorize the acquisition of the traffic control devices and other materials. Once this is accomplished, upon FHWA authorization, the state will advise the railroad that it may proceed with construction. The final stage of the project is an on-site inspection by FHWA and the state. The railroad (or, in some cases, another contractor used to install the devices) is reimbursed, for services and materials in accordance with the terms of the contract, by the state, which in turn seeks reimbursement from the federal government. Obviously, the Secretary of Transportation does not begin to exercise authority over the project only at the time the federal funds are disbursed.

The prior decisions of this Court provide the analytical framework for determining the point during a Federal-aid

grade crossing improvement project when preemption of state law occurs. This Court's decisions focus on the shifting of authority over the crossing from the state (and state rules of law allocating responsibility) to the federal government. The transfer of decisionmaking authority over warning devices to the Secretary occurs "on any project where Federal-aid funds participate in the installation of the device." § 646.214(b)(3)(i).[21] Once the state makes a decision to install warning devices under the Federal Program–a decision that must be made pursuant to federal law and subject to the approval of the federal government–the railroad's role in installing warning devices is simply to fulfill its obligations under the contract. Leaving intact state law obligations beyond this time would conflict with the entire regulatory process for crossing improvements and leave the railroads subject to clashing legal regimes.

The lower court's ruling cannot be reconciled with either the federal regulatory scheme or this Court's reasoning in *Easterwood* and *Shanklin,* which are premised on the notion that the key event is the ceding of control over the crossing to federal authority. Grounded in the view that disbursement of federal money triggers preemption, the logical conclusion of the test applied by the court below would have regulations which cover the duty to *select* proper devices become applicable only after the devices have been selected and paid for, long after control over the project has shifted to the federal government.

Regardless of whether federal money has been disbursed to the state, that event is not what triggers the application of the preempting regulations. Thus, proof of "federal funds [ ] actually hav[ing] been . . . spent" is not, contrary to the

---

[21] As petitioner points out, the test of preemption applied by the court below is in conflict with decisions of federal courts of appeals in *Hatfield v. Burlington N. R.R.*, 64 F.3d 559 (10th Cir. 1995) and *Armijo v. Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996).

analysis of the court below, the test of preemption. Nonetheless, the court's contrary legal conclusion led it to seize on Ms. Kirkland's acknowledgement that she did not handle the federal money, and (subject to a strong dissent) to use that as a basis for overturning the court of appeals' proper decision granting summary judgment. In reality, of course, neither party was under the illusion that federal funds had not participated in the installation of the warning devices at the Howe Road crossing.[22] The court below, cloaking itself in such an illusion, combined a misreading of federal law with a misuse of state law. The result was a decision which challenges an Act of Congress and prior decisions of this Court, and therefore should be reviewed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted

Respectfully submitted,

LOUIS P. WARCHOT
DANIEL SAPHIRE *
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202)639-2505

Counsel for Amicus Curiae

October 7, 2002

* Counsel of Record

[22] One of respondent's alternative arguments acknowledged that the warning devices had been installed with federal funds, but that the funds were from a source that did not trigger the preempting regulations.